IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1201463
AND ALL OTHER SEAMAN'S DOCUMENTS
ISSUED TO: Antonio HERNANDEZ

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1906

Antonio HERNANDEZ

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 14 June 1971, an Administrative Law Judge of the United States Coast Guard at New York, N.Y., revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved alleges that while serving under authority of the captioned documents on or about 12 November 1969, Appellant wrongfully did have in his possession 925.5 grams (approximately 2 lbs.) of hashish (cannabis sativa) on 12 November 1969 at Port Newark, New Jersey.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence a certified extract of shipping articles, a certified copy of a U.S. Customs Laboratory Report, the testimony of two (2) customs special agents and the testimony of a chemist.

In defense, Appellant offered his own testimony.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order revoking all documents issued to Appellant.

The entire decision was served on 14 June 1971. Appeal was timely filed on 22 June 1971.

FINDINGS OF FACT

On 12 November 1969, Appellant was serving as a P.O. Messman

on board the United States SS PRESIDENT HARRISON and acting under authority of his document while the ship was in the port of Port Newark, New Jersey.

Appellant had signed articles at San Francisco, California on 29 August 1969 as P.O. Messman. He signed off articles at New York on 11 November 1969 by mutual consent. Appellant upon leaving the vessel on that date took only some of his gear with him together with his souvenirs. He paid the Customs' duty on the souvenirs and went home. He returned to the vessel the next day to pick up the rest of his gear while the vessel was in the port of New York at Port Newark, New Jersey.

At about noontime on 12 November 1969 two Customs Inspectors were driving up Suez Street when they observed Appellant coming down the vessel's gangway leading to Suez Street and proceeding to an automobile parked about twenty yards from the gangway. The Customs Officers approached the car and inquired if any of the occupants were crewmembers from the SS PRESIDENT HARRISON. Appellant, who had been seated in the car, stepped out and upon request pointed to his gear in the trunk of the car which consisted of some bags and a suitcase. When Appellant opened the suitcase as directed, a Customs Officer after removing some clothing found a package wrapped in a ship's towel. This package contained a substance which the Customs Officer suspected as hashish. Appellant denied any knowledge of its presence or of its ownership. Appellant was then place under arrest and his rights were explained to him. He was personally searched and his room aboard the vessel was examined.

The substance was taken by the seizing officer to the Customs laboratory at Varick Street, New York where it was analyzed by a Customs laboratory chemist, and determined to be hashish with a net total weight of 925.5 grams.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge.

Appellant essentially raises three contentions on appeal which will be taken up in the following order:

(1) that the pleadings, charges and specifications of the Government were defective;

(2) that the seizure and interrogation of the Appellant were in violation of his constitutional rights under the

Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States;

(3) that the Government has failed to carry its burden of proving the charge and specification by substantial evidence of a reliable and probative nature.

APPEARANCE: Goldman, Cooperman & Levitt, New York, N.Y., by Ronald E. Goldman, Esq.

OPINION

I

While the issue of defective pleadings, charges, and specifications of the Government was not addressed by the Appellant in his brief in support of appeal, he sufficiently raised the issue in his notice of appeal to require discussion of it herein. Appellant's contention of defective pleadings raises the question of whether there was a variance between the facts pleaded and the proof offered such that he was not given adequate notice of the charge and specification. It is clear from the record that, although the charge did not allege service on the SS PRESIDENT HARRISON, all parties at all times were aware that the Appellant was considered as a crewmember of the vessel. The evidence establishes that the Appellant had just signed off articles and had returned to the ship to retrieve his remaining personal effects. Where an issue is raised during the proceedings and is actually litigated, there has been ample opportunity to cure surprise. See Kuhn v. C.A.B., 183 F. 2d 839 (D.C. Cir., 1950).

A second part of the same issue concerns whether under the circumstances the Appellant was serving under the authority of his document so as to give the Coast Guard jurisdiction. The evidence in the record supports the findings of the Administrative Law Judge that the Appellant had signed off the vessel the day prior, but had left some of his belongings on board so that his presence on the ship on 12 November and his activity near the vessel had a direct relationship to his employment status under his documents. For the purposes of the statute, the Appellant was acting under the authority of his documents at the time of his apprehension. Decision on Appeal No. 864.

II

Appellant's next contention concerning the validity of the search and seizure conducted of Appellant by the Customs Agents prior to his arrest is without merit. The usual requirements of probable cause and a search warrant do not apply to searches pursuant to 19 U.S.C. 1581(a) by Customs Officers. This question has been amply settled both in the courts of the United States and by my earlier decisions. See United States v. Yee Ngee How, 105 F. Supp. 517(N.D. Cal., 1952); United States v. Kayser, 322 F. Supp. 521 (S.D. Georgia, 1970); and Decision on Appeal Nos. 1081, 1536, and 1779.

III

Appellant argues in support of his third contention that the determinative issue in the case is whether or not he knew that the narcotic substance was in his suitcase. It is his major premise that the Government's case consisted of only such circumstantial evidence which is "at best capable of rousing only strong suspicion." A review of the entire record reveals that there is substantial evidence of a reliable and probative nature that the Appellant had wrongfully possession of the prohibited substance. The testimony of the two Customs Agents that the hashish was found in a suitcase identified by the Appellant as his own is not contradicted by any other evidence. The fact of possession raises a presumption of wrongful knowledge which requires the Appellant to satisfactorily explain the possession to the trier of fact. The Administrative Law Judge is free to reject Appellant's unsubstantiated claim of lack of knowledge. See decisions on Appeal Nos. 1081, 1380, and 1536. The point is settled that it is unnecessary for possession to be "personal and exclusive" and the mere fact that others may have had access to the place of concealment does not preclude a finding that the property concealed was in the possession of the person accused. Borgfeldt v. United States, 67 F. 2d 967 (Ninth Cir., 1933); Ng Sing v. United States, 8 F. 2d 919 (Ninth Cir., 1925).

Appellant advances the theory that if there are two possible inferences to be drawn from circumstantial evidence, the tribunal is required to choose the one leading to a finding of innocence. In this regard it pointed out that the proof required in this case is not proof beyond a reasonable doubts, but only substantial evidence. Decision on Appeal No. 1774. Evidence is not insubstantial because it permits of more than one inference. The question of weight to be accord the evidence is for the Administrative Law Judge to determine and, unless it can be shown that the evidence upon which the administrative law judge relied was inherently incredible, his findings cannot be against the weight of the evidence. The test is whether a reasonable man could

have made the same findings as reached by the Administrative Law Judge, not whether he would have agreed with those findings. Decision on Appeal No. 1753. I hold that the Government has born its burden of proving the charge and specification by substantial evidence of a reliable and probative nature.

IV

Finally, Appellant contends that his acceptance of a lesser plea while maintaining his innocence in a proceeding before the United States District Court for the District of New Jersey is a positive circumstance pointing away from his guilt. Appellant makes careful reference to North Carolina v. Alford, 91 S. Ct. 1600(1971), in support of this contention. The contention is without merit. The instant case does not involve the conviction of a narcotics drug law, the nature of Appellant's plea in any other case is not before me, and the Alford decision would militate against Appellant's contention anyway.

V

Although it is not necessary for the disposition of this case, I note that hashish is marijuana within the meaning of 46 USC 239. And I further note that no issue of experimental use was raised at the hearing nor upon appeal; to the contrary, the Appellant denied knowledge of possession. Further, the very amount of hashish found in his possession, 925.5 grams precludes any question of experimental use as that term is used in 46 CFR 137.03-4.

ORDER

The order of the Administrative Law Judge dated at New York, on 14 June 1971, is AFFIRMED.

C. R. BENDER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 30th day of January 1973.

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